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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 08 2007

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a research assistant professor at Northwestern University. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

*Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel states that the petitioner "is **internationally recognized** as on the forefront of research in gene therapy, specifically, the use of gene therapy for wound healing" (counsel's emphasis). The petitioner's recent work has been at the Wound Healing Laboratory at Northwestern University.

Several witness letters accompany the petitioner's initial filing. We shall discuss examples of these letters here. Notwithstanding counsel's claim that the petitioner "is internationally recognized," all of the witnesses are in the United States, at institutions where the petitioner is working or engaged in collaborations. The letters themselves, therefore, are not *prima facie* evidence of the claimed international recognition. Professor [redacted] Director of the Wound Healing Research Laboratory at Northwestern Laboratory, states that the petitioner "has made significant outstanding scientific and scholarly contributions." In a separate letter, [redacted] describes some of the petitioner's work:

> [The petitioner] is a co-investigator on our NIH grant on the regulation of dermal scarring by TGFB and is integral and indispensable to the work in our laboratory including the competitive renewal of our grant on the impact of ischemia, and aging on cytokine regulation of wound healing. [The petitioner] is an outstanding molecular biologist, and has played a crucial role in constructing plasmids and inserting them in retroviral, adenoviral, or naked DNA constructs for wound transfections. This strategy has been indispensable to the recent success of our laboratory. . . . In particular his success and experience in the past three years with in vivo transfection with viral and naked DNA vectors with novel promoters makes him indispensable and essentially irreplaceable.

of the Veterans Affairs Medical Center in Hampton, Virginia, describes the petitioner's earlier work there as a research assistant:

> [The petitioner] was successful in identifying complex intermediates that are associated with abnormal gene expression during scarring in alcoholic liver disease. . . . [The petitioner] was the first to identify a gene, referred to as Smad 7 that can reduce the liver scar formation and therefore, the progression of liver cirrhosis. He then began pursuing this line of investigation with hopes of finding, through genetic engineering, a treatment of choice for liver fibrosis.
>
> The use of Smad7 as a feedback inhibitor for scar formation has now been internationally accepted and must await development of acceptable gene therapy methods before it can be used for treatment of patients. Regardless, many other laboratories have adopted the principle that Smad7 can be used as a biological mechanism for limiting scarring in injured tissue such as lung fibrosis, kidney sclerosis and inflammatory bowel disease. It has also been reported that affected lesions in skin of scleroderma patients have excess scarring due to a lack of Smad7 production in these patients. [The petitioner's] early work was therefore very instrumental in introducing this concept that Smad7 could be used as an important regulator in not only liver scar formation but also many other abnormalities associated with wound healing.

[redacted] of the University of Florida, who (like [redacted]) is a past President of the Wound Healing Society, states:

> [The petitioner] has made outstanding original scientific research contributions to the field of hypertrophic scar formation. Excessive scarring is a major problem following trauma or surgical operations that causes reduced functions of the organs involved. Treatment modalities that would enable both diagnosis and treatment of scars would, therefore, have great potential clinical benefits. [The petitioner's] research addresses an issue of great importance to patients who are at increased risk of excessive, pathological scar formation. The focusing of his research has been understanding the impact of TGF-beta on wound healing and hypertrophic scar formation and the promising results could lead to novel treatment strategy for the treatment of hypertrophic scars.

Clearly, the petitioner has made a very favorable impression on his collaborators. We turn now to the objective evidence by which the petitioner seeks to corroborate the claim that his work has indeed influenced others in the field. Along with copies of "selected publications" by the petitioner, the petitioner submits a "sample of some citations to [his] work." The "sample" shows that one of the petitioner's articles has been cited twice since it was published in 1994. We note the following passage from [redacted] "Biographical Sketch": "Science Citation Index lists 4,500 cumulative citations to [redacted]'s refereed publications and reviews in January 2003: 24 publications with >50 citations, 10 publications with >100 citations, 7 publications with >150 citations and 3 publications with >250 citations." In this context, two documented citations over the course of a decade do not indicate particularly significant impact within the field. Certainly, to qualify for the waiver, the petitioner need not be one of the very top figures in the field, but once the claim

is put forward that the petitioner "is internationally recognized as on the forefront of research," it is fair and reasonable to determine whether the objective evidence bears out such a hyperbolic assertion.

The remainder of the petitioner's initial submission deals with his professional credentials, such as memberships in associations and fellowships that funded his postdoctoral training. These materials do not directly address the question of whether or not the petitioner qualifies for an exemption from the job offer requirement that normally applies to individuals in his field. While some of these awards recognize the petitioner's achievements, we note that 8 C.F.R. §§ 204.5(k)(3)(ii)(E) and (F) indicate, respectively, that membership in professional associations and recognition for achievements and significant contributions to the industry or field can form *part*, but not *all*, of a successful claim of exceptional ability. The plain wording of section 203(b)(2)(A) of the Act shows that a job offer is generally required for aliens of exceptional ability. Therefore, evidence of exceptional ability, including postdoctoral-level awards, is not presumptive evidence of eligibility for the waiver.

On August 8, 2005, the director issued a request for evidence. The director called for materials to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*, and instructed the petitioner to "submit copies of any published articles by other researchers citing or otherwise recognizing [the petitioner's] research and/or contributions." In response, the petitioner submits additional evidence (to be discussed momentarily) and new assertions from counsel.

Counsel observes that, as a nonimmigrant, the petitioner is often unable to apply for grant funding as a principal investigator. Counsel calls this situation a "Catch-22" because, if the petitioner were able to obtain this funding and call himself the principal investigator, there would be more grants in his name and he would be the first author of more articles. This would only be a "Catch-22" if the sole or primary obstacle to approval was the petitioner's lack of first authorships and grants in his name. In fact, the issue is broader than that. Counsel has asserted that various evidence shows that the petitioner stands out in his field, when in fact the evidence merely shows that the petitioner is active and prolific in his field. For instance, counsel states:

> [The petitioner's] influence on his field of employment is further evidenced by the fact that at the 15th Annual Wound Healing Society meeting at Chicago (May 18-21, 2005) out of a total of 177 research presentation/posters, he has co-authored/presented five of them. Out of over five hundred attendees, only eight other researchers have five or more research presentations at this conference.

Counsel thus equates the petitioner's "influence on his field" to the quantity of "presentation/posters" presented at the conference. Counsel fails to explain how quantity demonstrates influence in this way. Counsel is also selective in the data presented. For instance, there is no indication of how many of the "over five hundred attendees" even submitted five or more posters or presentations for consideration. With no objective gauge of the field's reaction to the petitioner's posters and presentations, the above facts serve only to illustrate the volume of the petitioner's output, not its influence.

New witness letters, from prior witnesses such as [redacted] indicate that a waiver would serve the national interest because the petitioner is involved in collaborative projects that would suffer from his

absence. [redacted] of Loyola University calls the petitioner "a bright member of [the] wound healing research community," whose "work, if continued, promises to develop new therapeutic strategies which could lead to more cost effective wound care management. Thus his ability to serve the national interest is substantially greater than the majority of my colleagues." This conclusion does not follow from the stated premises unless one assumes that the work of most members of the "wound healing research community" holds no promise for "new therapeutic strategies" or "more cost effective wound care management." This, in turn, raises the question of what this purported majority in the "wound healing research community" actually does. [redacted]'s brief, eight-sentence letter states that the petitioner "has already significantly influenced the field by designing many novel techniques, tools and reagents," but she does not further elaborate by specifying these techniques or explaining how these techniques are known to have "influenced the field" (for instance, through implementation at institutions where the petitioner is not an active researcher or collaborator). [redacted] does not list any "new therapeutic strategies" arising from the petitioner's work that have already been widely implemented or even advanced beyond hypothetical expectations.

The petitioner submits new evidence showing four citations of one of his articles. The petitioner also submits a copy of an article from *Perspective*, which appears to be an in-house publication at Strategic Analysis, Inc. (SA). The article is simply a list of "New Publications by SA Staff." One of the petitioner's collaborators, [redacted] is an SA employee. The article lists five articles by [redacted] the petitioner is a co-author of two of them. This appears to be the only reason the petitioner's publications were listed in this publication.

The petitioner submits copies of manuscripts and other documentation showing that the petitioner has continued to produce articles for publication (at least one of which required "some major revisions" before being accepted for publication). The objective evidence (*i.e.*, materials that were not created especially to support the petition) fails to show how the petitioner's work thus far has been so important, influential, or significant that the petitioner should receive a special benefit (the national interest waiver) that is not routinely granted to competent professionals – or aliens of exceptional ability – in his field.

The director denied the petition on March 10, 2006, stating that the petitioner's "witness letters demonstrate that the petitioner has excelled academically and is a competent researcher. The witnesses, however, fall short of demonstrating the petitioner's impact on the field beyond his educational institutions. . . . The petitioner offers no evidence that his findings have attracted significant attention from independent researchers in the field." The director asserted that the volume of the petitioner's published and presented output does not demonstrate the quality or impact of that work.

The petitioner's appeal includes no new evidence. It consists entirely of a 17-page brief from counsel. Counsel asserts that the director did not give sufficient weight to documentation of the petitioner's professional memberships and awards. The director had already observed, in the notice of decision, that evidence of exceptional ability does not establish eligibility for the waiver. Counsel does not address this observation, stating only that the director failed to consider the prestige of the awards and memberships. Counsel's arguments are not persuasive. For instance, counsel states: "Membership in the American Society

of Gene Therapy is limited to those whose work in the field has demonstrated their serious interest in research on gene therapy." "Serious interest," however, is not the threshold for the national interest waiver.

Counsel asserts that the petitioner's work was "well received" at professional gatherings, but this is a poor gauge of the extent to which other researchers have actually implemented the petitioner's findings and innovations. The petitioner does not automatically advance progress in the field simply by describing his work. Counsel repeats the unpersuasive argument that, because the petitioner presented a large number of posters and presentations at a meeting in Chicago, he must be among the most influential researchers in the field.

Counsel acknowledges that letters from independent witnesses would have helped to establish the breadth of the petitioner's reputation, but counsel contends that the petitioner's collaborators are, themselves, the top names in the field, and that the petitioner "should not be penalized for having such recognition that he already knows the top experts in the field and has been recruited by them." This assertion relies on the assumption that the beneficiary already enjoyed such "recognition" when he joined Northwestern in 2001. Thus, the argument assumes the very "recognition" that it sets out to prove.

We do not deny that the witness letters have some weight, but it remains that objective, documentary evidence ought to be available to support many of the key claims therein. Other assertions seem to limit the scope of the petitioner's achievements, such as repeated references to the *potential* usefulness of the petitioner's current work, with no indication of widespread implementation of work previously completed by the petitioner. Some letters claim without elaboration that the petitioner has set himself apart from others in the field; for instance, the assertion that "the petitioner's ability to serve the national interest is substantially greater than the majority of my colleagues" because the petitioner's work "promises to develop new therapeutic strategies," the implication being that most work in the field shows no such promise but is, for some reason, pursued nevertheless. It is difficult to see how this is the case, or what is the purpose for most wound healing research if not "to develop new therapeutic strategies."

Counsel states: "Among those who do manage to get a foot into the golden door of academic [*sic*], a very small percentage scale the ranks to full faculty positions such as Research Assistant Professor. Only those with clearly demonstrated achievements who are major contributors to the field do so." The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 2, 4 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel seems to assert that the petitioner's attainment of a "full faculty position," albeit a non-tenure-track position that is renewed annually and requires the petitioner to raise his own funds, demonstrates the petitioner's eligibility for a waiver. We reject the assertion that university faculty, as a class, are entitled to a blanket waiver.

We do not discount the reputations of the petitioner's employer or the witnesses who have offered statements on his behalf. We concur with the director, however, that the petitioner has failed to establish a reliable objective basis for approval of the waiver.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on

national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

**ORDER:** The appeal is dismissed.